IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8096 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

CHAUDHARI VIRASANGBHAI DALABHAI

Versus

CHAUDHARI RANCHHODBHAI RAGHJIBHAI

Appearance:

MR BJ JADEJA for Petitioners

MR AJ PATEL for Respondent No. 1, 2

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 29/06/2000

ORAL JUDGEMENT

1. The petitioners are the owners of land admeasuring 2 acres and 10 Gunthas forming part of Survey No.671 of village Charada, taluka Vijapur, district Mehsana. The said land was mortgaged to the predecessor-in-title of present respondents for an amount

of Rs.250/- on May 18, 1939, by a mortgage deed. According to the petitioners, the said mortgage was redeemed in 1980 and following that redemption, the respondents handed over the possession of the land to the petitioners. Since then, the petitioners are cultivating the land.

2. According to the petitioners, they also had another piece of land bearing survey No.144, which was also mortgaged to the respondents. In 1981, the petitioners requested for redemption of the mortgage of that land, to which the respondents declined and, therefore, there was a dispute between them and the petitioners were required to file civil suit in this regard. As a counter blast, the respondents made an application to the Mamlatdar and Agricultural Lands Tribunal, at Vijapur, under Section 70(b) of the Bombay Tenancy and Agricultural Lands Act, 1948 ("Tenancy Act" for short), claiming tenancy in respect of survey No.671 Paiki, admeasuring 2 acres and 10 Gunthas. The said application was registered as Tenancy Case No.27 of 1981. In that case, the case of the respondents was that the land was mortgaged in 1939, but the mortgage was redeemed in 1968. However, the respondents continued to cultivate the land as tenants of the petitioners till 1981 and because the petitioners started cultivating the land in the year 1981, the respondents were constrained to prefer the application under Section 70(b) of the Tenancy Act.

3. Initially, the Mamlatdar and Agricultural Lands Tribunal, after due inquiry, dismissed the application. The respondents preferred an appeal over the order and the appeal was allowed and the matter was remanded. The matter shuttled between various authorities for some time and, ultimately, an order came to be passed by the Mamlatdar and Agricultural Lands Tribunal on December 9, 1985, holding the present respondents as tenants of the land and directed that they should proceed under Section 84 of the Tenancy Act for eviction.

3.1 The said order was challenged by the present petitioners before Deputy Collector (Land Reforms), Mehsana, by preferring Tenancy Appeal No.187 of 1986. By judgment and order dated July 4, 1987, learned Deputy Collector dismissed the appeal.

3.2 A revision application was, therefore, preferred before the Gujarat Revenue Tribunal vide Revision Application No.447 of 1987, which also came to be dismissed by judgment and order dated October 26, 1988. The petitioner, therefore, has approached this Court with

this petition under Article 227 of the Constitution to assail the orders of Gujarat Revenue Tribunal and the preceding authorities.

4. Mr. Jadeja, learned advocate appearing for the petitioner, submitted that all the authorities below have committed a grave error of accepting the respondents as tenants. He submitted that there is no dispute about the fact that the petitioners are the land owners, that the land was mortgaged in 1939, that the mortgage has been redeemed and that since 1981 the land is being cultivated by the petitioners. He, however, submitted that the dispute is only regarding the question whether the redemption of the mortgage was in 1968 or in 1980 and whether the respondents cultivated the land from 1968 to 1980 as tenants. He submitted that there is no evidence whatsoever to indicate creation of tenancy in 1968 and there is no evidence regarding redemption of the mortgage in 1968. These aspects have been overlooked by the authorities below. None of the authorities have dealt with the question of tenancy. Mr. Jadeja submitted that against the evidence of the respondent (original applicants), there is an independent and cogent piece of evidence in the form of the witness through whom the redemption money was paid on behalf of the petitioners. This evidence has not been considered in its proper perspective by the authorities below.

4.1 Mr. Jadeja submitted that the application made before the Mamlatdar was time barred as it was not preferred within six months. He submitted that, according to the respondents-original applicants, the petitioners took possession in 1980, whereas the application was made in 1981, which is much after six months, the limitation fixed for the purpose. Mr. Jadeja submitted that, therefore, although the scope for the petition before this Court may be limited, this is a fit case where gross and grave injustice is caused and, therefore, this Court may entertain and allow this petition.

5. Mr. A.J. Patel, learned advocate appearing for the respondents, submitted that none of the authorities below have committed any error. In view of the law laid down by the Apex Court in Gopal Krishnaji Ketkar v. Mohamed Haji Latif & Ors., AIR 1986 SC 1413, it was incumbent upon the petitioners to have produced the release deed to indicate that the mortgage was redeemed in 1980 and not in 1968, as claimed by the respondents. This was the best piece of evidence which was available with the petitioners and the petitioners ought not to

have kept it back. Mr. Patel submitted further that the respondents have examined two witnesses in support of their case about the redemption of the mortgage in 1968. It is true that one of the witnesses had no personal knowledge, but at least one witness claims to have a direct knowledge about the transaction of redemption, who has stated in his deposition that the negotiations took place in his presence and that a document was also executed. Whether to accept this deposition or not would be a finding of fact and this Court may not enter into the arena of re-appreciation of evidence. It cannot be said that the finding of the authorities below based on such evidence is perverse because, the view taken by the authorities below is also possible and this Court in exercise of powers under Article 227 may not substitute its views. In this regard he has placed reliance on Mohd. Yunus v. Mohd.Mustaqim & Ors., AIR 1984 SC 38. Mr. Patel submitted further that a legal point has not been raised before the authorities below, but in light of A.A. Shirdone v. Saheb H. Tajbhokari, AIR 1985 SC 836, followed by this Court in Motibhai Ranchhodbhai Patel & Anr. v. Jethabhai Chhelabhai, 1988(2) GLR 1489, an application within one year was required to be made by the petitioners, which has not been made and, therefore, the petitioners lose their right of challenging the tenancy of the respondents as it was a mortgage of 1939.

5.1 Lastly, Mr. Patel submitted that the question of limitation raised by Mr. Jadeja will also not survive in light of the decision in the case of Desaibhai Shanabhai Patel & Anr. v. Bhulabhai Prabhudas Patel & Ors., 1994(2) GLR 1647. He, therefore, submitted that the petition may be dismissed.

6. Having regard to rival side contentions, it may be noted that, as rightly pointed out and conceded to by Mr. Jadeja and Mr. Patel, there is no dispute about the fact that the petitioners are the land owners of the disputed land. There is no dispute that the property was mortgaged in 1939 by a mortgage deed and that it has been redeemed. The dispute spins around the question as to when the redemption took place, in 1968 or in 1980. Another question that requires consideration is, if the mortgage was redeemed in 1968, whether, thereafter, a tenancy in favour of the respondents was created.

7. Before addressing these two material questions, what is required to be examined is what would be the jurisdiction of this Court in exercise of powers under Article 227 of the Constitution and how far this jurisdiction may be exercised. So far as jurisdiction

under Article 227 of the Constitution is concerned, it is only a supervisory jurisdiction and not an appellate or revisional jurisdiction. This Court may not enter into the arena of re-appreciation of evidence and may refrain from substituting its views or opinion or interpretation of evidence with the views, opinion or interpretation of the authorities below unless they are found to be perverse or against the record.

8. The main point that is agitated by Mr. Jadeja, learned advocate for the petitioner, is regarding limitation in filing the application. He has drawn attention of this Court to the fact that the application under Section 70(b) of the Tenancy Act was preferred on November 30, 1981. Against this, the case of the respondents was that the petitioners started ploughing in 1980 on the Akha Trij day, that would be somewhere in June. Mr. Jadeja, therefore, submitted that six months' period would be over by end of December 1980, whereas the application is preferred on November 30, 1981 and, therefore, the application was time barred. This aspect has not been considered by the authorities below. In this regard, it may be noted that, according to deposition of respondent-Ranchhodbhai Raghjibhai, the petitioners ploughed the land in 1980. But against this, there is evidence to show that it was in 1981 and not 1980 which has been accepted by the authorities below. As discussed above, this Court may not enter into re-appreciation of evidence. Apart from this, in the decision of this Court in Desaibhai Shanabhai Patel v. Bhulabhai Prabhudas Patel, 1994 (2) GLR 1647, it has been categorically held that there are no provisions prescribing for period of limitation for an application under Section 70(b) of the Tenancy Act and, therefore, Section 5 of the Mamlatdar's Courts Act cannot be read, so as to prescribe any period of limitation for application under Section 70 of the Tenancy Act. In view of this settled proposition of law, the contention raised by Mr. Jadeja regarding the application being barred by limitation cannot be accepted.

9. Now, coming to the other contention raised by Mr. Jadeja, it may be noted that for supporting the case of redemption in 1968, the respondents have examined Thakore Bapuji Chhaganji. If his deposition is seen, he states that he was present when the talks/negotiations for redemption were being carried on in the shop of Mansukhbhai Sheth. He had gone there for purchase of cloth. He states that Virsangbhai said that mortgage may be redeemed and the respondents may cultivate the land on crop share basis. For that purpose, half share in the

monsoon crop and one fourth share in the winter crop was fixed. Mr. Jadeja has shown to this Court the deposition of this witness. It is clear from the deposition that, according to this witness, some document was also executed. The necessary inference is that, that document was of release/redemption, which would necessarily be in possession of the petitioners.

10. As such, it cannot be said that there is no evidence to indicate redemption in 1968 and creation of tenancy at that time. It may be noted that, this is being discussed by this Court not with a view to re-appreciating the evidence, but only to examine whether there is evidence or not and, as discussed, it is found that there is some piece of evidence produced by the respondents before the authorities below in support of their case. Against this, the petitioners have not produced any documentary evidence to indicate redemption in 1980. The only evidence that is produced is deposition of Harjivandas Shivram Patel, through whom redemption money of Rs.3150/- is claimed to have been credited to the accounts of the respondents (Rs.1575/each). If deposition Harjivandas is seen, he only speaks of having debited the account of the petitioners and credited the account of the respondents with the above amount and candidly accepts that he did not know what the transaction was for.

11. The situation, therefore, arises is that there is oral evidence of redemption in 1968 and creation of tenancy in 1968 produced by the respondents. There is no evidence coming from the petitioners' side to indicate redemption of mortgage in 1980 except except the oral version of Harjivandas as stated above. Ordinarily, when a mortgage is redeemed, a document is executed. It is not the case of the petitioners that no such document was executed and, therefore, in order to rebut the evidence of the respondents' side, the petitioners ought to have produced evidence in the form of redemption deed which may have been executed in 1980, if their version is correct. In this regard, the law, as laid down by the Apex Court in Gopal Krishnaji Ketkar v. Mohamed Haji Latif & Ors., AIR 1968 SC 1413 may be considered, where the Court observed thus :

> "A party in possession of best evidence which would throw light on the issue in controversy must produce the said document. If that is not done, the Court ought to draw an adverse inference against such party. The party cannot rely on abstract doctrine of onus of proof or on

the fact that the party was not called upon to produce it."

12. It is contended by Mr. Jadeja that, as per the petitioners' case, the document executed in 1980 regarding redemption was not given to the petitioners as the respondents are money lenders. In this regard, it may be noted that, again, this Court would be entering into the arena of re-appreciation of evidence which is to be avoided by the Court in exercise of powers under Article 227 of the Constitution.

12.1 Mr. Jadeja, in support of his case, further submitted that village forms No.7 and 12 indicate that the land was shown to be cultivated as No.1, i.e. under self-cultivation. This aspect is not in dispute factually. In this regard, it may be noted that the Mamlatdar and Agricultural Lands Tribunal has observed that even after redemption, the type of cultivation is shown as No.1. However, these entries cannot be taken as evidence to decide the factum of redemption or otherwise as it is only to indicate the mode of cultivation, i.e. whether by tenant or by landlord. The entry is made only on basis of application that may have been given to the authority concerned. If that is not done, an erroneous entry may continue and, therefore, this cannot be taken to support the case of the petitioner. Apart from this, it may be noted that mode of cultivation is shown to be No.1, to indicate that the land was under self-cultivation. The position is existing between 1968 and 1980, admittedly. It is argued that this is because the respondents were cultivating the land as mortgagee. If this was so, it is not shown as to what was the position before 1968. And that contention of Mr. Jadeja cannot be accepted. Again, this Court may not enter into that arena as it would be re-appreciation of evidence and disturbing the concurrent findings of fact by the authorities below. But the contentions are examined only to satisfy the conscience of the Court.

13. Last but not the least, a legal point is raised by Mr. Patel regarding the mortgage being of 1939. In this regard, the decision of the Apex Court in the case of A.A. Shirdone v. Saheb H. Tajbhokari, AIR 1985 SC 836, may be taken into consideration. It was held that a mortgagee in possession does not get status of a tenant under Section 2A of the Act of 1939 on the strength of saving provision in Section 89(2)(b) of the Act of 1948. This very judgment was followed by this Court in Motibhai R. Patel & Anr. v. Jethabhai Chhelabhai & Ors., 1988(2) GLR 1489. It was held that to defeat the claim

of mortgage-in-possession, it is absolutely necessary that mortgager makes an application under Section 2A and 3A of the Bombay Tenancy Act, 1939, as amended in 1946. In the instant case, no such application is even claimed to have been made.

14. In view of what is discussed above, what emerges is that there are concurrent findings of fact of three authorities below regarding redemption of mortgage in 1968 and creation of tenancy thereafter, this is a case where this Court, in exercise of powers under Article 227 of the Constitution, should not interfere. Further, the petitioners have not been able to indicate redemption of the mortgage in 1980 by rebutting the evidence of the respondents's side and the application under Section 70(b) cannot be said to have been time barred. The petition, therefore, cannot be entertained by this Court and deserves dismissal. The petition is, therefore, dismissed. Rule is discharged. Interim relief stands vacated. No costs.

[A.L. DAVE, J.]

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